Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-760

HELEN K. TASSOP,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

GENE CRESCENZI
Attorney for Petitioner
415 Lexington Avenue
New York, New York 10017
(212) 682-1686

517 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 | New York, N.Y. (212) 840-9494 | Philadelphia, Pa. (215) 563-5587 | Washington, D.C. (202) 783-7288

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In The

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No.

HELEN K. TASSOP,

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UNITED STATES OF AMEERICA,

Repondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, Helen K. Tassop, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on March 24, 1978.

The opinion of the Court of Appeals appears in the Appendix, pages 1a, *et seq.*

JURISDICTION

On August 1, 1978, the Court of Appeals denied petition for a rehearing of its opinion affirming on the merits of judgment in the United States District Court for the Eastern District of New York entered on consent. The jurisdiction of this Court is invoked under Title 28, U.S.C. Sections 1252 and 1254(1) and (2).

QUESTIONS PRESENTED

1. The issue of due process of law, in violation of the petitioner's rights under the Fifth and Fourteenth Amendments of the United States Constitution procedurally and substantively.

The procedural issue in question relates to the IRS application of jeopardy assessments, resulting in irreparable damage to the petitioner by property seizure under economically adverse circumstances.

The substantive issues relate to the entry of an alleged consent judgment made under false and fraudulent representations by the United States Attorney, to induce the petitioner to consent to judgment.

2. Whether the consent judgment based on an alleged consent agreement made on February 6, 1976, under false representation by the United States Attorney is valid.

STATUTES INVOLVED

The statutes here involved are Internal Revenue Code (1954), Sections 6322, 6331, 6502(a), 6671, 6862 and 7403, and the United States Constitution, the Fifth and Fourteenth Amendments.

STATEMENT OF THE CASE

The United States brought this action on September 9, 1975, for a judgment against the petitioner and to foreclose tax liens. This action threatens the closing of St. Andrew Academy and its chapel in Beechhurst, New York. This was preceded by an administrative seizure and sale of petitioner's property in California for an insignificant amount of its value. The petitioner has always maintained that she was subjected to unauthorized jeopardy assessments, illegal liens and illegal levies, seizure and sale. As a result of an alleged consent agreement obtained by the United States Attorney by a trick, inducement and misrepresentation, the merits of the case were never brought to trial. The alleged consent agreement was a scheme devised to thwart the petitioner's attempts for a fair trial. Having failed in obtaining administrative justice, petitioner fell into the trap of an alleged consent agreement, which deprived her of examining the simplest documents, such as notices and demands. The jeopardy assessment, including penalties and interest, could not be challenged because petitioner waived her rights according to the circuit court decision.

Immediately after the case was brought to trial and before the alleged consent agreement was reached, the district court held a hearing and granted the Government a preliminary injunction on September 19, 1975.

The record fails to show that the petitioner was not represented by an attorney. A request to obtain new counsel was denied, and petitioner had no adequate representation to question the merits of the assessments. She was thereby deprived of a fair hearing, at a crucial stage of the judicial process.

A date for a trial was set. However, before the conclusion of the discovery process, an alleged consent agreement was arranged between the United States Attorney and petitioner's

former attorney. It was an open-ended agreement, as far as the final figure was concerned, and the Government's attorney made the following concession:

> "Now, the Government will concede that the liens as allegedly stated for which Notice and Demand was given on May 18, 1972 and August 11, 1972, were not valid liens." (Record on Appeal, p. 93a).

The concession by the Government, that the liens were invalid, convinced the petitioner that there was no need for her to pursue the matter of investigating the validity of the liens, which had and continued to have the effect of causing her tremendous hardship, incapacitated her economically, and made of her a virtual economic hostage, since their imposition in 1972. All previous attempts to obtain such an admission by administrative means had fallen on deaf ears.

United States Attorney Retracts Concession

The mispresentation by the United States Attorney, J. Brian Ferrel, regarding the alleged consent agreement, came to light in a hearing in district court on April 22, 1977. In referring to his concession that the liens were invalid, the United States Attorney told the court that the liens were *not invalid.* The text from the record on appeal on the cross-examination on pages 355a and 356a follows:

> "Q. . . . Why were the liens invalid? A. Pardon?
>
> Q. Why were the liens invalid? A. The liens were not invalid. As a part of the settlement, Mr. Newman informed me that it was a matter of preference to Miss Tassop that she felt the Government had not followed correct procedures

> in connection with making the assessment against her, and that this was a matter of principle with respect to the validity of these liens. I was prepared to litigate the proper procedures for the IRS in return for proceeding with the assessment of the validity of the liens. I was going to obtain what I wanted, a $290,000 judgment for unpaid liability tax. As part of the settlement, you will notice in the record Miss Tassop acknowledged she had not transferred any property since May or June of 1972.
>
> Q. You mean to obtain what you wanted you put a statement on the record that was patently untrue, and you knew it was untrue? A. For the purposes of settling the case and obtaining a judgment for the full amount of the tax liability, which was due, I agreed to make a statement with respect to only the liens for which the assessment had been made.
>
> Q. And that statement was untrue even though you — I want to know if it's true or untrue.
>
> MR. MITCHEL: I think he is arguing with the witness and for that reason I object to the question."

In addition to revealing that the United States Attorney used the "invalid lien" concession in the consent agreement as a bait to induce the petitioner to relinquish her rights for a fair trial of the merits of the case, the United States Attorney has taken out from the consent agreement its heart and soul and sought to enforce a meaningless agreement on the petitioner.

The reaction of the court to the revelation is interesting. Having heard the above revelations, the court said, on pages 356a and 357b of the record of appeal:

> "THE COURT: Well, isn't it a matter of conclusion and not fact that we are talking about here? It was his opinion as the lawyer that the liens were valid, and he was expecting to demonstrate that by proof.
>
> It's possible, of course, that the proof might not have satisfied the Court, and the Court might have held against him. In other words, it was — it couldn't be said to be an ironclad promise. He had a strong belief in it, but he was willing to dislodge himself in that position and concede that term for settlement. That is a common thing lawyers do every day. You all know that."

This anomaly created by the United States Attorney raises serious questions: Under the Internal Revenue Code, tax assessment liens continue to exist independently of suit or judgment. The judgment must be satisfied before they are released. (I.R.C. (1954), 26 U.S.C.A., Sections 6322, 6502(2).) The liens therefore cannot be released by simply arriving at a figure and turning it to a judgment. Furthermore, the invalidity of the lien relates back to the date of its filing. This is relevant to the petitioner because she suffered economic hardships resulting from the invalid liens, including the loss of her property in California.

The Government has not changed its position that the liens are *valid*. The United States Attorney repeated this before the court of appeals and the Internal Revenue Service adheres to the same position.

When the United States Attorney made the concession that the liens were invalid, the petitioner took that to be a true statement, especially coming from the representative of the United States Government. Had the petitioner known at the time that the IRS officials would not be bound by that statement, and had she known it was a meaningless statement, she would not have entered into the consent agreement in the first place.

The court of appeals rejected the petitioner's contention that the consent agreement was based on misrepresentation (Appendix A, 1a, *infra*). However, the court failed to take into consideration the statements of the United States Attorney made in court in which he retracted the concession regarding the invalidity of the liens (Record, p. 93a). Both courts are, in fact, ordering the petitioner to accept the consent agreement whether the Government admits the liens are valid or invalid. If this is allowed to stand, it will be tantamount to consent by force and coercion.

Another anomaly arising from the consent agreement is the fact that the Government ties the issue of the validity and invalidity of liens to an admission by the petitioner of a certain sum, to be determined later.

This is absurd at best. The validity and invalidity of liens are governed by rules of law and procedure. Liens do not become invalid if the taxpayer admits a liability and valid if he does not admit it. This might explain the futility encountered by the petitioner in trying to arrive at a final figure with representatives of the IRS. As long as they do not concede the fact that the liens are invalid, relevant questions pertaining to notices and demands, dates of notices, penalties and interest were not revealed to the taxpayer. A Catch-22 situation was created.

The decision of the court based on the alleged consent agreement will deprive the petitioner of her rights to a trial to challenge the merits of the assessments, and would impose on her a one-sided agreement renounced by the Government. Total loss of petitioner's means of livelihood will result. Review by this Court is thus plainly warranted.

REASONS FOR GRANTING THE WRIT

I. This is an appeal from the judgment of the United States District Court, Eastern District of New York, dated July 27, 1977, for the foreclosure of federal tax liens and the judicial sale of the real property in the name of Tassop Realty, Inc., which is housing St. Andrew Academy on the Sound, situated in Queens County, New York, and also on appeal from the order of the same court dated July 27, 1977, in which the same court amended the judgment entered on February 7, 1976, as amended on May 27, 1976, by affirming the consent judgment under which "the plaintiff, the United States of America, recover of the defendant, Helen K. Tassop, d/b/a the St. Andrew Academy on the Sound, the sum of $263,992.37, with interest thereon, as provided by the law."

II. This appeal is made on the following grounds:

a) The United States District Court erred in rejecting the submissions of defendant-appellant for granting the defendant-appellant relief from the judgment of the United States District Court of February 7 and May 27, 1976, without taking notice of the important legal grounds and controlling decisions raised in the defendant-appellant's memorandum of law submitted to the district court

b) The district court did not take into consideration the established facts which were before the court that defendant-appellant agreed to the stipulation dated February 6, 1976 by mistake, inadvertence, excusable neglect and intrinsic

and extrinsic misrepresentation by the previous attorney of defendant-appellant, Peter Newman, and by the attorney of the plaintiff.

The attorney of plaintiff-respondent, J. Brian Ferrel, as appears on page 356a of the record on appeal, on cross-examination, made a statement which was untrue and he knew it was untrue. The text is as follows:

> "Q. You mean to obtain what you wanted you put a statement on the record that was patently untrue, and you knew it was untrue? A. For the purposes of settling the case and obtaining a judgment for the full amount of the tax liability, which was due, I agreed to make a statement with respect to only the liens for which the assessment had been made."

The district court disregarded the principles of law and the controlling decisions by not granting petitioner relief from the stipulation, as stated in the following:

4 A.L.R. Fed. 537, page 539; *George S. Colton Elastic Web Co. v. White,* 16 F. Supp. 726 (D.C. Mass. 1936); *George S. Colton Elastic Web Co. v. White,* 23 F. Supp. 761 (D.C. Mass. 1938); *First Nat. Bank & T. Co. v. Jones,* 61 F. Supp. 364 (D.C. Okla. 1945); *Commissioner v. Chase Manhattan Bank,* 259 F.2d 231, *cert. denied,* 359 U.S. 913, 3 L. Ed. 2d 575, 79 S. Ct. 589 (CA 5 Tex. 1958); *Brast v. Winding Gulf Colliery Co.,* 94 F.2d 179 (CA 4 W. Va. 1938).

c) The district court erred by not taking into consideration the ample evidence before it that the IRS violated the laws, regulations and procedures pertaining to the collection of taxes, liens and levies as follows:

1. That a jeopardy assessment was made against defendant-appellant under Section 6862 of 26 U.S.C.A. (I.R.C. 1954) without proper delegation of authority and in violation of administrative procedural and substantive due process.

The Court disregarded the following controlling decisions on this point, which were submitted by defendant-appellant:

Thornton v. United States of America, in the U.S. District Court, East.District, Pa., Civil Action 72-1259, 1/22/73, 1973 Standard Federal Tax Reports 80,422.

2. That the IRS failed to give the notices and demands required by the statute before a levy was authorized or liens filed. The court disregarded the weight of evidence in the record, proving these violations, and disregarded the following controlling decisions on this point:

United States v. Coson, 61-1 U.S.T.C. para. 9219 (9th Cir. 1962); *Bessie A. Mrizek and John R. Mrizek v. H. Alan Long,* District Director of Internal Revenue for the Chicago District, Chicago, Illinois, 187 Federal Supp. 830; *Steiner v. Long,* 261 F.2d 45 (1958).

The above-cited controlling decisions empower the court to enjoin the collection of taxes and to declare the liens filed against defendant-appellant as void and illegal.

d) The defendant was deprived of her right to challenge the merits of the assessment in a suit to foreclose liens. *(United States v. O'Conner,* 7 AFTR 2d, 1541, 291 F.2d 520 (2 Cir. 1961)).

e) The defendant-appellant was deprived of her constitutional right to a fair trial. The defendant-appellant is being deprived of her property, an Academy with five hundred (500) students and forty (40) teachers, without due process of law.

CONCLUSION

Petitioner is not challenging the constitutionality of the taxing authority of the Government. At issue is the violation of statutes relating to jeopardy assessments, levy and seizure, the total nonexistence of notices of assessment and demand.

By reneging on his stipulation in open court that the liens are invalid, the United States Attorney succeeded in circumventing the judicial process, denying petitioner a fair trial to adjudicate all matters.

These are exceptional circumstances warranting relief in equity.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

s/ Gene Crescenzi
Attorney for Petitioner

APPENDIX A — OPINION OF UNITED STATES COURT OF APPEALS, SECOND CIRCUIT

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-fourth day of March, one thousand nine hundred and seventy-eight.

Present:

IRVING R. KAUFMAN,
Chief Judge

J. JOSEPH SMITH

THOMAS J. MESKILL,

Circuit Judges,

United States of America,

Plaintiff-Appellee,

-against-

Helen K. Tassop, d/b/a St. Andrew Academy on the Sound; and Tassop Realty, Inc.,

Defendants-Appellants.

Appendix A

77-6162

FILED
March 24, 1978
A. Daniel Fusaro, Clerk

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

1. All of the evidence concerning the February 6, 1976 conference indicates that no misrepresentations were made to Mrs. Tassop regarding the scope and effect of the consent judgment.

2. Tassop cannot avoid her obligation to pay employee withholding taxes even if Internal Revenue Service employees failed to follow internal procedures. *See, e.g., Smith v. United States,* 478 F.2d 398, 400 (5th Cir. 1973). Moreover, Mrs. Tassop waived the issue of improper assessment procedures by failing to raise it at the April 22, 1977 hearing before Judge Neaher.

3. The treaties between the United States of America and Greece and Mexico cited by appellants in no respect obligate the United States to refrain from enforcing tax laws against the owners of a private school.

Appendix A

4. As to the remaining points raised by counsel, the judgment is affirmed on the opinions of Judge Neaher dated July 27, 1977 and June 3, 1977.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

s/ J. Joseph Smith
J. JOSEPH SMITH

s/ Thomas J. Meskill
THOMAS J. MESKILL,
Circuit Judges.

APPENDIX B — ORDER DENYING PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS

Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of August, one thousand nine hundred and seventy-eight.

UNITED STATES OF AMERICA,

Plaintiff-Appellant-Appellee,

v.

HELEN K. TASSOP, d/b/a ST. ANDREW ACADEMY ON THE SOUND; TASSOP REALTY, INC.; ASTORIA FEDERAL SAVINGS AND LOAN ASSOCIATION; ESTELLE LEIBOWITZ LUNGO, Executrix of the Estate of HOWARD LIEBOWITZ,

Defendants,

HELEN K. TASSOP, d/b/a ST. ANDREW ACADEMY ON THE SOUND, and TASSOP REALTY, INC.,

Defendants-Appellees-Appellants.

FILED
Aug. 1, 1976
A. Daniel Fusaro, Clerk

77-6160

Appendix B

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated July 10, 1978 to recall the mandate and stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure and to extend the time to file a petition for rehearing be and it hereby is denied.

s/ Irving R. Kaufman
IRVING R. KAUFMAN,
Chief Judge

s/ J. Joseph Smith
J. JOSEPH SMITH,

s/ Thomas J. Meskill
THOMAS J. MESKILL,
Circuit Judges

Supreme Court, U. S.
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DEC 1 1978
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No. 78-760

In the Supreme Court of the United States

OCTOBER TERM, 1978

HELEN K. TASSOP, ETC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

We wish to call to the Court's attention certain facts that indicate that the petition was filed out of time. The judgment of the court of appeals was entered on March 24, 1978 (Pet. App. 2a). In accordance with the 90-day time limit for seeking certiorari in a civil case established by 28 U.S.C. 2101(c), the time within which the petition should have been filed expired on June 22, 1978. On July 10, 1978, Mr. Justice Marshall denied petitioner's application for an extension of time within which to seek certiorari. The petition was filed on November 1, 1978. The Court therefore lacks jurisdiction to consider the petition. See, *e.g.*, *FTC* v. *Minneapolis-Honeywell Co.*, 344 U.S. 206, 207 (1952); *Department of Banking* v. *Pink*, 317 U.S. 264, 268 (1942); *Toledo Co.* v. *Computing Co.*, 261 U.S. 399, 417-418 (1923).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

Supreme Court, U. S.
FILED
JAN 3 1979
MICHAEL RODAK, JR., CLERK

In The

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October Term, 1978

No. 78-760

HELEN K. TASSOP,

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vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY OF PETITIONER TO MEMORANDUM OF RESPONDENT

GENE CRESCENZI
Attorney for Petitioner
415 Lexington Avenue
New York, New York 10017
(212) 682-1686

517 LUTZ APPELLATE PRINTERS, INC.
Law and Financial Printing
South River, N.J. (201) 257-6850 New York, N.Y. (212) 840-9494 Philadelphia, Pa. (215) 563-5587 Washington, D.C. (202) 783-7288

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October Term, 1978

No. 78-760

HELEN K. TASSOP,

Petitioner,

vs.

UNITED STATES OF AMEERICA,

Repondent.

REPLY OF PETITIONER TO MEMORANDUM OF RESPONDENT

It is submitted that respondent did not state all the facts in its Memorandum. The following are the facts:

1. The judgment of the Court of Appeals was entered on March 24, 1978.

2. Petitioner and her attorneys were never notified of the said judgment. One attorney of petitioner knew by chance about the judgment on June 16, 1978.

3. On June 22, 1978 petitioner applied for an extension of time to file a writ of certiorari.

4. On July 10, 1978 petitioner applied to the Court of Appeals to recall the mandate and stay its reissuance and for reargument.

5. On July 15 petitioner knew that her petition for an extension of time for a writ of certiorari was refused on July 10, 1978.

6. The Court of Appeals denied the motion of petitioner on August 1, 1978.

7. The petitioner submitted the petition to the Supreme Court of the United States for a writ of certiorari on November 1, 1978.

It is submitted that the time does not run against the petitioner except from August 1, 1978, when her motion for a rehearing was denied by the Court of Appeals, and therefore her petition was made in time and that the objection of respondent should be rejected.

Respectfully submitted,

s/ Gene Crescenzi
Attorney for Petitioner